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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE TESLA, INC. SECURITIES LITIGATION	Case No. 3:18-cv-04865-EMC **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE A NEW TRIAL**

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ISSUES TO BE DECIDED

I. Should the Court deny Plaintiff's motion for judgment as a matter of law because (a) Plaintiff failed to move on all elements of his Rule 10b-5 claim; (b) in any event, substantial evidence supports that Plaintiff failed to meet his burden to prove the statements were materially false and to prove fraud-on-the-market reliance; and (c) Plaintiff did not move for judgment as a matter of law as to Tesla and the Director Defendants?

II. Should the Court deny Plaintiff's motion for a new trial because (a) Plaintiff did not move for a new trial on liability; (b) Plaintiff did not challenge the jury's verdict or the Court's instruction on loss causation; and (c) Plaintiff's motion for a new trial on damages is contingent on the Court granting his underlying motion for judgment as a matter of law on liability, and because his argument as to instruction error is meritless?

INTRODUCTION

Plaintiff's motion is baseless and should be denied. The extremely diligent and attentive jurors who sat through three weeks of trial correctly rejected Plaintiff's claims and Plaintiff offers no reason why no reasonable jury could reach the result that nine jurors unanimously reached in a few hours. But this Court need not even reach Plaintiff's argument for judgment in its favor because Plaintiff did not move for judgment on the Rule 10b-5 claim, but only on the elements of materiality and reliance. As with Plaintiff's Rule 50(a) motion, Plaintiff neglected to even request judgment on the required element of loss causation. Because Plaintiff bears the burden of proof as to each element of his claim, his failure to move on loss causation bars the Court from entering judgment in his favor on liability under any circumstance, particularly in light of the general verdict form. Plaintiff also failed to move on the element of imputation of scienter against Tesla or his Section 20(a) claim against the Director Defendants and therefore cannot be granted judgment against them either.

In any event, the jury's swift verdict confirmed what the record makes clear: Plaintiff did not present sufficient evidence to carry his burden against Mr. Musk, Tesla, and Tesla's Directors Brad W. Buss, Robyn Denholm, Ira Ehrenpreis, Antonio J. Gracias, James Murdoch, Kimbal Musk, and Linda Johnson Rice. The great weight of the evidence supports the jury's verdict.

While Plaintiff spends most of his motion on the question of materiality, a reasonable juror readily could find Plaintiff failed to meet his burden to prove the materiality of the misrepresentations. The true state of affairs—that Mr. Musk had a "strong verbal commitment" from the Saudi Arabian Public Interest Fund ("PIF") to fund a take-private and that funding such a transaction would otherwise not be an issue either through his own personal wealth and/or through scores of interested investors—did not differ in a material way that would be significant to a reasonable investor from his Tweets. Documentary evidence, the testimony of Mr. Musk's advisors, Tesla employees, and market analysts and investors (including Plaintiff) confirmed this conclusion. The jury's verdict was also supported by the fact that Tesla's stock price ***increased*** when he revealed the full state of affairs to the market on August 13, 2018, and Plaintiff's expert's own admission that Tesla's stock price would have reacted the same way on August 7, 2018 had Mr. Musk simply announced that he was considering taking Tesla private and nothing more.

Beyond that, Plaintiff plainly failed to meet his burden to separate the price impact of the alleged misrepresentations from the truth and other market effects, as Plaintiff's own expert acknowledged that he had failed to even attempt to link the alleged misrepresentations to any loss. As to reliance, the jury could reasonably conclude that Plaintiff failed to prove all the elements of the fraud-on-the-market presumption or, alternatively, that Defendants rebutted the presumption based on Plaintiff's expert's admission that the price reaction would have been the same even absent the alleged misrepresentations.

Plaintiff's alternative motion for a new trial is similarly infirm. At the threshold, Plaintiff did not move for a new trial on liability—nor could he because he failed to move for judgment as a matter of law on loss causation and cannot challenge the sufficiency of the evidence as to that element—but instead seeks only a new trial on damages. In other words, the Court can grant Plaintiff's request for a new trial ***only if*** it first enters judgment on liability—*i.e.*, only if the Court were to rule that no reasonable jury could have found in Defendants' favor on ***every*** element of Plaintiff's claim. Plaintiff's failure to move on all the elements of his Rule 10b-5 claim precludes the Court from doing so and in turn dooms Plaintiff's new trial request. Plaintiff's request fails on the merits in any event. The great weight of the evidence does not support overturning the jury's verdict on liability and Plaintiff's limited claims of instructional error—which are not directed at any of the Court's substantive instructions on the elements—are unsupported, waived, or harmless.

The Court should deny Plaintiff's incomplete, procedurally defective, and meritless motion in its entirety and enter judgment in favor of Defendants.

BACKGROUND

A. Plaintiff's Claims

Lead Plaintiff Glen Littleton represents a class of individuals and entities who purchased or sold Tesla stock, options, and other securities from 12:48 p.m. EST on August 7, 2018 to August 17, 2018 (the "Class Period"). Plaintiff brought claims against Defendants Elon Musk and Tesla for violations of Sections 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j, 78t) and SEC Rule 10b-5(b) (17 C.F.R. § 240.10b-5) when Mr. Musk published from his personal Twitter account two Tweets on August 7, 2018: "Am considering taking Tesla private at $420. Funding secured" and "Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote." Plaintiff also

brought a Section 20 claim against all members of Tesla's Board of Directors on the grounds that they were controlling persons of Tesla.

B. The Court's Summary Judgment Order And Clarification

On April 1, 2022, the Court granted partial summary judgment on the issues of falsity and scienter. ECF No. 387. Specifically, the Court found that the following statements in Mr. Musk's August 7 Tweets were false and made recklessly: "Funding secured" and "Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote."

The Court declined to grant summary judgment for Plaintiff on the element of reliance under the fraud-on-the-market presumption. *Id.* at 32. The Court found that there were disputed issues of material fact on materiality and Defendants' entitlement to rebut the fraud-on-the-market presumption. Specifically, the Court found that "there is evidence suggesting that the misrepresentations [at issue] did not actually affect the market price" of Tesla securities because "there is evidence that, after the 8/13/2018 blog post, which served as a partial corrective disclosure, there was no decline or at least not a significant decline in stock price; thus, arguably, the reaction to the tweets on 8/7/2018 was a response to Mr. Musk contemplating taking Tesla private and not to statements that, *e.g.*, funding was secured or investor support confirmed." *Id.*

Defendants moved for reconsideration of the Court's order. ECF No. 401. At the June 16, 2022 hearing on Defendants' motion for reconsideration, the Court made clear that it found only that the statements "Funding secured" and "Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote" were "false statement[s]…in a literal sense, not in a legal sense." (6/16/22 Hr'ing Tr. at 4:14-23.) The Court made the same limited finding as to scienter. (*Id.* ("and similarly with scienter, no reasonable juror could find that Mr. Musk did not know or didn't act in disregard to the inaccuracy—the factual inaccuracy, not the legal").) And to avoid any doubt, the Court stated "[t]o be clear, I did not find materiality with respect to the misrepresentation or a reckless disregard or knowingly scienter with regard to any such material representation." (*Id.* at 5:4- 8.) In its Minute Order following the hearing, the Court noted that "[a] statement can be factually false but not material." ECF No. 446.

C. The Trial

On January 17, 2023, the parties went to trial on Plaintiff's claims. At trial, Plaintiff bore the burden to prove each element of his Rule 10b-5 claim against Defendants Elon Musk and Tesla: (1) that Elon Musk and/or Tesla made untrue statements of a material fact in connection with the purchase or sale of securities, (2) Elon Musk and/or Tesla acted with the necessary state of mind, (3) Elon Musk and/or Tesla used an instrument of interstate commerce, (4) Plaintiff justifiably relied on Elon Musk and/or Tesla's untrue statements of material fact in buying or selling Tesla securities, and (5) loss causation. ECF No. 655 at 7. In addition, as to Tesla, Plaintiff bore the burden to impute Mr. Musk's state of mind to Tesla. Plaintiff also bore the burden to prove his Section 20(a) claim against each of the Director Defendants. Consistent with the Court's summary judgment order, the jury was instructed "to assume that the statements 'Funding secured' and 'Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote.' were untrue. But you still must decide whether these statements were of material facts. You must also assume Mr. Musk acted with reckless disregard for whether the statements were true. But you must still decide whether he knew that the statements were untrue." *Id.*

At trial, the jury heard evidence concerning Mr. Musk's Tweets and the underlying state of affairs that the Tweets concerned. Mr. Musk, Tesla's CFO Deepak Ahuja, and Mr. Musk's Chief of Staff Sam Teller testified that the Saudi Arabian Public Investment Fund ("PIF") had, since January 2017, been interested in funding Tesla going private. The PIF held multiple meetings with Mr. Musk in 2017 in which its Managing Director, Yasir Al-Rumayyan, repeatedly expressed interest in providing full financing to take Tesla private. In one of those meetings, Mr. Musk informed the PIF that if it was interested in a take-private transaction, it should first purchase significant shares in Tesla stock on the public market.

On July 31, 2018, Mr. Musk, Mr. Ahuja, and Mr. Teller attended a meeting with the Saudi PIF at Tesla's Fremont factory. During that meeting, the PIF revealed to Mr. Musk that it had acquired nearly five percent of Tesla's stock—a multi-billion dollar holding. During this meeting, the PIF reiterated its interest in taking Tesla private. The participants discussed the potential size, cost, and structure of the transaction—with Mr. Musk expressing a preference that Tesla's existing shareholders be given the

opportunity to retain their shares in a private Tesla. During the meeting, the PIF expressed that it "was willing to act" and take all necessary steps to fund a take-private. The participants at the meeting understood that the PIF had made a "strong verbal commitment" to fund the take-private transaction, that the PIF and Mr. Musk had a "handshake deal" in principle to take Tesla private, and that all that was left was to work out the details. (Exs. 82-83; Tr. 891:10-21 (Musk); 1195:6-1198:3 (Ahuja); 1892:22-1893:3 (Teller).) Following the meeting, Mr. Musk emailed a bid to Tesla's Board of Directors to take the company private at $420 per share (Ex. 81) and both Mr. Musk and Mr. Ahuja independently met with the Board to discuss the transaction and the PIF's interest and commitment (Exs. 82, 83). Following these meetings, Mr. Musk arranged calls with lawyers and advisors, including Egon Durban of Silverlake Capital, to discuss the take-private. At no point did Mr. Musk, who was independently wealthy and held tens of billions of dollars of stock in SpaceX, express any concern about funding.

On August 7, 2018, after learning that the *Financial Times* intended to publish an article revealing details of Mr. Musk's meeting with the PIF, Mr. Musk published his first Tweet: "Am considering taking Tesla private at $420. Funding secured." (Ex. 8.) Tesla's shares rose on the announcement of Mr. Musk's consideration. Throughout the day, Mr. Musk published a series of Tweets outlining his preferred structure. Later that day, Tesla published a Blog Post from Mr. Musk which stated that "no final decision" had been made, made clear that the transaction was in its early stages, articulated the potential structure, and stated that any take-private process would be finalized by a shareholder vote. (Ex. 12.) Mr. Musk retweeted and linked to the Blog Post in his second Tweet which stated "Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote." (Ex. 13.) Prior to publishing this Tweet, Mr. Musk had received messages of interest and support from major Tesla investors, such as Ron Baron. (Ex. 1008.)

At trial, the jury heard testimony that the term "funding secured" was not a financial term of art. The witnesses had multiple interpretations of what the term meant. Plaintiff Glen Littleton testified that he understood it to be consistent with the fact that "the PIF had strongly expressed their support, and that a deal—[Mr. Musk] thought a deal could be closed[.]" (Tr. 373:5-14; 422:13-18.) Investor Timothy Fries testified that the term indicated that "there had been some vetting" of the potential funding source. (Tr. 509:6-7 (Fries).) Goldman Sachs' head of investment banking, Dan Dees, testified that he thought

"funding secured" meant "that [Mr. Musk] was in touch with the capital required." (Tr. 1385:22-1386:3 (Dees).)

Following the publication of the Tweets, Mr. Musk worked with advisors Goldman Sachs and Silverlake Capital to take steps to effectuate the take-private transaction. Mr. Musk's advisors all testified that there was ample funding available to take Tesla private and that funding would not be an issue. Market analysts and investors, such as Owuraka Koney of Jennison, similarly testified that they believed that "the money was out there for [Tesla] to go private." (Koney Dep. Tr. 56:19-24.)

On August 13, 2018, Mr. Musk published a Blog Post that explained why he said "funding secured." (Ex. 53.) In that Blog Post, Mr. Musk detailed his meeting with the Saudi PIF and explained that while he did not have funding in hand, the PIF "strongly expressed [] support for funding a going private transaction for Tesla," that the PIF was "eager to proceed," and that he "left the July 31st meeting with no question that a deal with the [PIF] could be closed." (*Id.*) Plaintiff testified that the Blog Post was consistent with funding secured. (Tr. 422:13-18.) Mr. Musk also explained the next steps, including submitting a final proposal, an evaluation process by a special committee, approval of the plan, regulatory approvals, and finally a shareholder vote. (*Id.*) Following the publication of the Blog Post, Tesla's stock price marginally ***increased***.

On August 23, 2018, after meeting with his advisors, Mr. Musk informed the Board of Directors that he would not be going forward on the take-private transaction. (Ex. 101.) Mr. Musk explained that his decision was based on the fact that many of Tesla's investors preferred that the company remain public. Mr. Musk's advisors, who also attended the meeting, confirmed that "there was more than enough interest and funding to execute" the take private. (*Id.*) The following day, Mr. Musk published a Blog Post announcing his decision.

Plaintiff called two experts—Dr. Michael Hartzmark and Dr. Steven Heston—to opine on the options market, loss causation, and damages. Dr. Hartzmark presented a so-called "leakage model." On cross-examination, Dr. Hartzmark admitted that he analyzed both Tweets together as "an interwoven bundle" and did not separate out the price effect or market impact of the undisputedly true portion of Mr. Musk's Tweet—that he was considering taking Tesla private at $420—from the alleged false statements. (Tr. 1695:2-7.) Dr. Heston, on cross-examination, admitted that had Mr. Musk only tweeted the true

statement, the market would have had the "same exact movement" as it did when Mr. Musk posted the Tweets at issue. (Tr. 1617:21-1618:1.)

Following closing argument, the jury deliberated and returned a general verdict of not liable in favor of Mr. Musk and Tesla on both Tweets.

D. Plaintiff's Rule 50(a) Motion

Before the close of evidence, Plaintiff filed a Rule 50(a) motion for judgment as a matter of law. Notably, Plaintiff did not move for judgment as to his entire claim, nor did he move for judgment as to Tesla's imputed liability or his Section 20(a) claim against the Director Defendants. ECF No. 657 at ii-iii. Instead, Plaintiff moved only for judgment as a matter of law on the issues of materiality, class-wide reliance, and individual reliance. *Id.* Plaintiff did not move for judgment as a matter of law on loss causation or instrument of interstate commerce. *Id.* In fact, Plaintiff's Rule 50(a) motion does not even mention the terms "loss causation" or "interstate commerce" at all. By failing to so move, Plaintiff waived his right to seek judgment as a matter of law on those elements, his entire Rule 10b-5 claim, his claim against Tesla, and his Section 20(a) claim. Plaintiff also waived his right to challenge the sufficiency of the evidence of those claims in a motion for a new trial.

E. Plaintiff's Instant Motion

On March 7, 2023, Plaintiff filed his instant Motion for Judgment as a Matter of Law or in the Alternative for a New Trial. ("Mot.") Although Plaintiff suggested that he was moving for judgment as a matter of law "on the remaining 10b-5 elements" for liability, he only renewed his 50(a) motion as to the issues of materiality, class-wide reliance, and individual reliance. Mot. at ii. He did not move for judgment as a matter of law on the required elements of loss causation or instrument of interstate commerce and thus did not move for judgment as to his Rule 10b-5 claim as a whole. *Id.* at ii-iii. Instead, Plaintiff claimed without citing to any authority that "loss causation should be decided in [his] favor" because he purportedly proved materiality, notwithstanding that materiality and loss causation are separate elements of a Rule 10b-5 claim. *Id.* at 20. Plaintiff did not move for judgment as to Tesla's imputed liability for the Rule 10b-5 claim or on his Section 20(a) claim.

Plaintiff also moved for a new trial. However, Plaintiff did not move for a new trial on liability. Instead, he simply sought a new trial on damages based only on instructional error. Mot. at iii. Plaintiff's

requested new trial is thus contingent on the Court granting judgment as a matter of law as to liability for his entire Rule 10b-5 claim, even though Plaintiff did not so move. *Id.* at ii-iii.

ARGUMENT

II. PLAINTIFF CANNOT BE GRANTED JUDGMENT AS A MATTER OF LAW

A. Plaintiff's Motion Should Be Denied Outright Because He Failed To Move On All Elements Of The Rule 10b-5 Claim

Plaintiff did not move under Rule 50(b) on all elements of his Rule 10b-5 claim and therefore cannot be granted judgment as a matter of law. The motion, like Plaintiff's Rule 50(a) motion before it, omits the elements of "instrument of interstate commerce" and, crucially, "loss causation." But Rule 50 does not provide or allow for a "partial" judgment as a matter of law, and Plaintiff cites to no authority to the contrary. Plaintiff cannot reverse the jury's verdict on liability without even attempting to show that he met his burden as to each element of his claim. His piecemeal motion must therefore be denied in its entirety.

"[I]n order to find in favor of the plaintiff on a motion for judgment n. o. v., plaintiff must prove all of the elements of the offense, whereas a defendant may prevail on a motion for judgment n. o. v. if it can prove any element has not occurred." *R. S. E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954, 958 (M.D. Pa. 1981);[1] *Sagicor Life Ins. Co. v. Jang*, 2022 WL 17328237, at *5 (C.D. Cal. Oct. 27, 2022) ("Before the case was submitted to the jury, Plaintiffs moved for judgment in their favor only on the issue of malice…***Without reaching all elements of Plaintiffs' claim***, the Court cannot enter judgment as a matter of law.") (emphasis added). Under the plain text of Rule 50, the Court is permitted to grant judgment as a matter of law only as to a ***claim*** or defense and not, as with a motion for summary judgment, an element or part of a claim. *Compare* Fed. R. Civ. P. 50 (a)(1)(B) (the court may "grant a motion for judgment as a matter of law against the party on a ***claim or defense***") (emphasis added) *with* Fed. R. Civ.

[1] A renewed motion for judgment as a matter of law was referred to as a judgment notwithstanding the verdict, or "JNOV," under a prior version of Rule 50. The Ninth Circuit has made clear that "[t]he standard for granting the post-verdict motion is the same whether designated as a JNOV or a renewed motion for judgment as a matter of law." *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1458 (9th Cir. 1993).

P. 54(a) ("A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought."); *see also Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.*, 1995 WL 150089, at *2 (N.D. Cal. Mar. 28, 1995) (under the Federal Rules of Civil Procedure, a "[c]laim is defined as a set of facts which, if established, give rise to one or more enforceable legal rights"); *Imperial Prod., Inc. v. Zuro*, 1971 WL 16494, at *8 (D. Minn. July 1, 1971) ("Under the Federal Rules of Civil Procedure, a 'claim' is synonymous with a 'cause of action.'").

Thus, to be entitled to a judgment as a matter of law under Rule 50, Plaintiff must establish that the jury's verdict was not supported by substantial evidence as to ***each element*** of his Rule 10b-5 claim. *See e.g.*, *Marker v. City of San Jose*, 2014 WL 5302175, at *1 (N.D. Cal. Oct. 16, 2014) (denying plaintiff's motion for JMOL where substantial evidence supported jury's verdict as to one element, even if the court presumed plaintiff would prevail on all others); *McAllister v. Hawaiiana Mgmt. Co.*, 918 F. Supp. 2d 1044, 1062 (D. Haw. 2013) (denying JMOL where plaintiff failed to establish entitlement to judgment on causation element of retaliation claim), *aff'd*, 689 F. App'x 560 (9th Cir. 2017). This requirement is particularly relevant where, as here, the jury returned a general verdict on liability—as Plaintiff himself had proposed—and the Court cannot identify which particular element the jury found the Plaintiff failed to prove.

Under Rule 10b-5, Plaintiff was required to prove the elements of (1) material falsity, (2) scienter, (3) use of an instrument of interstate commerce, (4) reliance, and (5) loss causation. ECF No. 655 at 6, 15 ("Plaintiff must prove by a preponderance of the evidence that Mr. Musk and/or Tesla's misrepresentations caused their economic injury); *see also Metzler Inv. GMBH v. Corinthian Colleges*, Inc., 540 F.3d 1049, 1065 (9th Cir. 2008) (affirming dismissal of 10b-5 claim for failure to plead loss causation). Accordingly, to prevail on his motion, Plaintiff must establish that the "evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict" as to all elements of his Rule 10b-5 claim, including loss causation. *Barnard v. Theobald*, 721 F.3d 1069, 1075 (9th Cir. 2013); *McAllister*, 918 F. Supp. 2d at 1062. Because Plaintiff did not move on and offers no argument that "there is no legally sufficient basis for a reasonable jury to find for" Defendants on the element of loss causation, *Krechman v. Cnty. of Riverside*, 723 F.3d 1104, 1109-10 (9th Cir. 2013), he cannot be granted judgment on his Rule 10b-5 claim and his motion must be denied. *See Sagicor*, 2022 WL 17328237, at *5.

Plaintiff recognizes that his failure to move on the elements of "loss causation" and "instrument of interstate commerce" is fatal to his motion and that he cannot establish liability under Rule 10b-5 as a matter of law. But instead of forthrightly addressing this defect, Plaintiff attempts to waive it away by falsely claiming that "the other elements of Rule 10b-5" except for materiality "are undisputed," that "loss causation should be decided in Plaintiff's favor" because "the evidence at trial firmly supports that Musk's tweets were material," and that "if the Court agrees with Plaintiff on materiality, then the only issue necessary for a jury to decide is the amount of damages caused by the Tweets." (Mot. at 20, 25, n. 8.) In other words, Plaintiff brazenly asserts that loss causation—an element that he has never even moved on—should be presumed.

Plaintiff is wrong. First, Plaintiff's claim that "loss causation" and "materiality" are the same element or require the same quantum of proof is incorrect as a matter of a law. *Compare* ECF No. 655 at 10 (Material Misrepresentation Instruction) *with id.* at 15 (Loss Causation Instruction); *see also Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016) ("the ultimate issue" for the element of loss causation "is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss"). Second, and dispositively, Plaintiff never raised this argument in his Rule 50(a) motion and is therefore precluded from making it now. *See e.g.*, *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) ("A party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion."). Indeed, not only is this unsupported and borderline frivolous argument not included in Plaintiff's Rule 50(a) motion, the term "loss causation" does not appear in the Rule 50(a) motion ***at all***. ECF No. 657. Because Plaintiff waived his right to bring a post-trial motion for judgment as a matter of law on his Rule 10b-5 claim when he failed to so move under Rule 50(a), his motion should be denied. *See Sagicor*, 2022 WL 17328237, at *5; *Blumhorst v. Pierce Mfg., Inc.*, 2014 WL 1319717, at *6 (D. Idaho Mar. 28, 2014) (denying Plaintiff's JMOL for failure to raise all issues on a Rule 50(a) motion).

B. <u>Plaintiff Is Not Entitled To Judgment As A Matter Of Law On The Two Elements Of The Rule 10b-5 Claim He Did Move On</u>

Even if the Court entertained Plaintiff's purported motion for partial judgment as a matter of law—and it should not—it should still be denied because the record shows that there is substantial evidence

supporting the jury's verdict. "A jury's verdict must be upheld if it is supported by substantial evidence." *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001). "Substantial evidence is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion from the same evidence." *Id.*; *see also Paradise Nw. Inc. v. Randhawa*, 2014 WL 3867429, at *2 (E.D. Cal. Aug. 6, 2014) ("To justify relief through a JMOL, there must be a 'complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party.'"). On a motion for judgment as a matter of law, the Court "may not substitute its view of the evidence for that of the jury," *id.*, "must draw all reasonable inferences in favor of the nonmoving party," and "may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000). A trial court can overturn the jury "***only if***, under the governing law, there can be but one reasonable conclusion as the verdict," *i.e.*, "there is no legally sufficient basis for a reasonable jury to find for that party on that issue." *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001) (emphasis added).

1. Plaintiff Failed To Meet His Burden To Establish The Statements Were Materially False

To prove material falsity, Plaintiff had the burden to establish ***both*** that (1) there is a "substantial likelihood that a reasonable investor would consider the [misrepresented] fact important in deciding whether to buy or sell that security" and (2) the "misrepresentation gives a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists." ECF No. 655 at 10; *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1259 (N.D. Cal. 2000) ("there must be a substantial likelihood that the disclosure of the omitted fact [or correction of the misstated fact] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available") (alteration in original); 17 C.F.R. § 240.10b-5. In other words, Plaintiff had the burden to prove that the difference between the actual state of affairs and the misrepresentation would have been significant to a reasonable investor. *TSC Indus.*, 426 U.S. at 449; *In re McKesson*, 126 F. Supp. 2d at 1259; *see also* ECF No. 508 (Pretrial Order) at 26; *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1144 (9th Cir. 2017). And, on this Motion, Plaintiff carries the additional burden of proving that "there can be but one reasonable

conclusion as to the verdict." *Winarto*, 274 F.3d at 1283. Plaintiff cannot meet his burden because ample evidence supports the jury's verdict here.

As to the first Tweet, there was substantial evidence upon which the jury could conclude that Plaintiff failed to meet his burden to establish that "Am considering taking Tesla private at $420. Funding secured," differed in a material way from the true state of affairs and that the difference would have been significant to the reasonable investor. To start, there is no dispute that Mr. Musk was actually considering taking Tesla private at $420 at the time he published the Tweet. (*See e.g.*, Ex. 81.) And the statement "funding secured" was not materially different from the real state of affairs, and it certainly did not differ in a way that would be significant to the reasonable investor. There is substantial documentary and testimonial evidence showing that—prior to the Tweets—the PIF made a "strong verbal commitment" to Mr. Musk to take Tesla private and provide the necessary funding to do so. (Exs. 82- 83; Tr. 891:10-21 (Musk); Tr. 1195:6-1198:3 (Ahuja).) Although no price or percentage was discussed, the PIF made clear to the attendees of the July 31 meeting it was willing to do whatever was necessary to fund the transaction and that it had ample financing to do so. (Tr. 744:16-746:10 (Musk); 1180:15-1184:11, 1185:16-1186:2, 1188:1-1189:19 (Ahuja); Exs. 82-83.)

A reasonable juror could therefore conclude that the actual state of affairs did not differ from the term "funding secured" in a way that would be significant to the reasonable investor. As multiple witnesses testified, "funding secured" is "not a term of art" in the financial industry and was thus capable of multiple interpretations. (Tr. 1165:16-18 (Ahuja); 1385:22-1386:3 (Durban).) But Mr. Littleton—who represented to the jury that he possessed the characteristics necessary to be considered a "reasonable investor"—testified that the state of affairs presented at trial that "the PIF had strongly expressed their support, and that a deal—[Mr. Musk] thought a deal could be closed" was consistent with the phrase "funding secured." (Tr. 373:5-14; 422:13-18.) So too did Plaintiff's witness Mr. Fries, who testified that "'Funding secured' to me meant that there had been some—vetting, some critical review of those funding sources," and Mr. Dees, who testified that he thought "funding secured" meant "that [Mr. Musk] was in touch with the capital required." (Tr. 509:6-7 (Fries); 1385:22-1386:3 (Dees).) The parties presented the jury with substantial evidence that a wide-range of investors'—from retail day traders to the head of investment banking at one of the most prominent investment banks in the world—understanding of the

term "funding secured" was not materially different from the actual state of affairs in a manner that would be significant to the reasonable investor.

But the jury did not have to rely on this testimony alone. During the trial, the jury was presented with evidence that, when Mr. Musk disclosed the details of the actual state of affairs regarding his meeting with the PIF to the market in his August 13 Blog Post, ***Tesla's stock price increased*** —rather than falling as one would have expected if the market viewed this disclosure as a revelation of a material misrepresentation. (Ex. 53; Tr. 1688:2-9 (Hartzmark).) As the Court noted in its Summary Judgment Order, at the very least, this stock price reaction allows a reasonable juror to reach the conclusion that the initial market reaction to the Tweets "was a response to Mr. Musk contemplating taking Tesla private and not to" the "statements that, *e.g.*, funding was secured or investor support confirmed." ECF No. 387 at 32. Because "[t]he standard for judgment as a matter of law under Rule 50(a) 'mirrors' the summary judgment standard," *Reed v. Lieurance*, 863 F.3d 1196, 1204 (2017), and the Court is required to "draw all reasonable inferences in favor of the nonmoving party," *Reeves*, 530 U.S. at 150, ***this fact alone*** precludes the Court from granting judgment as a matter of law for Plaintiff on whether the statement "funding secured" was materially false.[2]

Substantial evidence also supported the jury's verdict that Plaintiff failed to meet his burden to prove that the second Tweet, "Investor support confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote," was materially false. As to the first sentence, the record is clear that Mr. Musk had support from the PIF ***and*** that he had already received confirmation of support for his contemplated transaction from Ron Baron, a significant Tesla investor. (Ex. 1008.) As the Jury Instructions and case law provide, the jury "must decide whether something was material based on the circumstances as they existed at the time of the statement." ECF No. 573 at 40; *see also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 43 (2011) (assessing materiality of statement "requires consideration of the source, content, and context of the [statement]"); *Carvelli v. Ocwen Fin. Corp.*, 934

[2] On top of that, the evidence shows that Mr. Musk had "ample funding available" to take Tesla private even without the PIF, including his personal holdings (including tens of billions of dollars in SpaceX stock) (Tr. 740:10-741:12 (Musk)) and significant interest from other outside investors. (Exs. 101; 201.)

F.3d 1307, 1321 (11th Cir. 2019) ("the materiality inquiry includes consideration of the context in which a statement was made and the circumstances in which a reasonable investor would have heard it"). The second Tweet retweeted and linked to Tesla's August 7 Blog Post, which provided important context to the Tweet. (Ex. 13.) The August 7 Blog Post reaffirmed Mr. Musk's statement that he was only "considering" a take private and that the transaction was preliminary and required a number of steps and decisions before it would be taken to a shareholder vote. (Ex. 12.) Additionally, the second Tweet was sent ***after*** Mr. Musk sent a series of Tweets articulating his envisioned structure. (Exs. 8-11.) Thus, read in context—as the statement must be, *Matrixx*, 563 U.S. at 43—no reasonable investor would interpret Mr. Musk's Tweet as an announcement that the proposal would go straight to a shareholder vote. Plaintiff himself testified as such. (Tr. 389:21-24; 390:21-23; 398:14-399:1 (Littleton).) When Mr. Musk disclosed to the market on August 13 the additional steps necessary to take Tesla private (Ex. 53), Tesla's stock price increased—again proving that the difference between the Tweet and the true state of affairs did not "significantly alter[] the 'total mix' of information made available." (Tr. 1688:2-9 (Hartzmark)); *see TSC Indus.*, 426 U.S. at 449. And again, as the Court previously found on summary judgment, the stock price reaction to the August 13 Blog Post alone supports a reasonable inference that investors did not consider the statement "investor support confirmed"—as opposed to the undisputedly true statement that Mr. Musk was considering taking Tesla private—important in deciding whether or not to buy Tesla stock, and it was thus not material. *See* ECF No. 387 at 32; *Reeves*, 530 U.S. at 150.

Faced with a record replete with substantial evidence supporting a reasonable conclusion that Plaintiff failed to meet his burden to prove material falsity and a deferential standard that requires the Court to draw all reasonable inferences in Defendants' favor, Plaintiff has no choice but to attempt to rewrite the law. ***First***, Plaintiff tries to shift the burden to Defendants to prove that the Tweets "were immaterial." Mot. at 16, 18. But Defendants had no such burden at trial, let alone do they have such a burden in opposition to Plaintiff's motion for judgment as a matter of law. ECF No. 655 at 10. The relevant inquiry is not whether Defendants proved the Tweets were immaterial, but whether there is substantial evidence to support the jury's conclusion that Plaintiff failed to meet his burden at trial. *See Paradise Valley*, 251 F.3d at 1227. As discussed above, there is ample evidence to support the jury's finding. ***Second***, Plaintiff contends that judgment as a matter of law should be granted because the Tweets

as a whole were "material." Mot. at 12-13. That misstates the law and the Plaintiff's burden in this case. Plaintiff was required to prove that Mr. Musk's "misrepresentation[s]" were materially false. ECF No. 655 at 10. Accordingly, Plaintiff had to separate the undisputedly true statement—"Am considering taking Tesla private at $420"—from the allegedly false statements and prove that the representations in those specific statements differed from the actual state of affairs in a manner that would have been significant to a reasonable investor. *Id.*; *In re McKesson*, 126 F. Supp. 2d at 1259. Plaintiff made the tactical decision not to do so and instead treated the Tweets—including the true statement—as an "interwoven bundle." (Tr. 1732:21-1733:6; 1735:4-9 (Hartzmark).) Plaintiff's failure to offer evidence that the individual false statements moved the market provided the jury with substantial evidence to conclude that Plaintiff did not meet his burden to prove that ***those statements*** alone were material. Numerous witnesses testified that the only material statement was Mr. Musk's announcement of his consideration. (*See* Tr. 1159:8-10 (Ahuja); 1477:13-19 (Denholm).) And Dr. Heston, Plaintiff's own expert***, affirmed*** that conclusion by testifying that the market would have reacted the same way had Mr. Musk only tweeted "Am considering taking Tesla private at $420." (Tr. at 1617:21-1618:1.)

Plaintiff's remaining arguments similarly fall flat. Plaintiff contends that evidence of investor and analyst reactions to the Tweets conclusively prove that the ***misrepresentations*** were materially false. Mot. at 13. This argument rests on cherrypicked evidence and ignores the testimony of one of the analysts, Mr. Koney of Jennison, who stated that he "was never concerned about [Tesla's] ability to go private" because "the money was out there for them to go private" and Tesla and Mr. Musk "had the capacity to do it and also enough cash available" to execute the deal. (Koney Dep. Tr. 56:20-24, 58:1-2, 108:19-24, 158:15-17.) Thus, even accepting Plaintiff's argument that "analysts serve as a proxy for the market" as true, there was substantial evidence for the jury to find that at least some of these market proxies concluded that the statements "funding secured" and "investor support confirmed" did not differ in a material way from the true state of affairs in a way that mattered to their investment decisions.

Nor does Plaintiff establish that the evidence compels a verdict that the alleged misstatements were materially false. Plaintiff attempts to advance this argument by narrowly defining "funding secured" to mean a "written commitment for secured funding." Mot. at 14. But the Court already rejected this interpretation (ECF No. 387 at 13), and there is substantial evidence that the reasonable investor

understood the term to be much broader: Mr. Musk was either "in touch with the capital required" to fund the transaction, that the "PIF had strongly expressed their support" and that Mr. Musk thought a deal could be closed, or that there was some sort of "verbal commitment" to fund the transaction. (*See, e.g.*, Tr. 422:13-18 (Littleton); 1454:8-9 (Dees); Koney Dep. Tr. at 22:3-6.). This understanding of "funding secured" was consistent with the evidence presented concerning the state of affairs following Mr. Musk's July 31, 2018 meeting with the PIF. (Tr. 744:16-746:10 (Musk); 1180:15-1184:11, 1185:16-1186:2, 1188:1-1189:19; 1195:6-1198:3 (Ahuja); 1889:8:1893:10 (Teller); Exs. 82-83.) Plaintiff also argues that the jury could not reasonably conclude that he failed to meet his burden because Mr. Musk "did not know the exact amount of funding needed for the going private transaction" at the time he published the Tweets. Mot. at 15. But the evidence presented at trial supports the reasonable inference that—notwithstanding the fact that the precise cost of the transaction had not been determined—there was ample funding available to take Tesla private. For instance, Mr. Ahuja testified that the PIF understood that it may need to fund as much as 50 percent or more of Tesla's market cap and Mr. Dees testified that Goldman Sachs concluded that "there was ample funding available for the transaction" and that "funding would not be an issue." (Tr. 1183:1-12 (Ahuja); 1454:6-18, 1461:4-16 (Dees); Ex. 101.) These facts were consistent with the understanding of investors and analysts—Plaintiff's so-called "prox[ies] for the market"—who testified that "the money was out there for [Tesla] to go private." (Koney Dep. Tr. 56:20-24, 58:1-2, 108:19-24, 158:15-17.) Finally, Mr. Musk testified that at worst, he could have used his own considerable wealth and SpaceX stock to fund the transaction if need be. (Tr. 740:10-741:12 (Musk).) Mr. Musk's unrebutted testimony provides further substantial evidence from which the jury could reasonably conclude that Tweets did not differ from the true state of affairs in a way that would be significant to the reasonable investor.

Thus, "draw[ing] all reasonable inferences in favor of the nonmoving party," *Reeves*, 530 U.S. at 150, as the Court must, more than substantial evidence supports the jury's verdict.

2. Plaintiff Failed To Meet His Burden To Prove Fraud-On-The-Market Reliance

Plaintiff also has failed to show that "there is no legally sufficient basis for a reasonable jury to find for" Defendants on the element of reliance. *See Krechman v. Cnty. of Riverside*, 723 F.3d 1104, 1109-10 (9th Cir. 2013); ECF No. 655 at 13-14. To prove reliance, Plaintiff had the burden to establish

the fraud-on-the-market presumption, ECF No. 655 at 13, by proving that "(1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268 (2014) ("*Halliburton II*").

As an initial matter, the jury could reasonably conclude that Plaintiff failed to prove all the elements of the fraud-on-the-market presumption. As discussed at pages 11-16, *supra*, there is substantial evidence to support the jury's conclusion that Plaintiff failed to meet his burden to establish that the misrepresentations at issue—"Funding secured" and "Investor support confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote."—were materially false.

There is also substantial evidence to support a conclusion that Defendants rebutted the presumption. Defendants could rebut the fraud-on-the-market presumption "by proving by a preponderance of the evidence that the ***misrepresentation*** did not affect the market price of Tesla's stock." ECF No. 655 at 13-14; *Halliburton II*, 573 U.S. at 278-29 (emphasis added). First, Plaintiff failed to disaggregate the price impact of the misrepresentations from the true statements in the Tweet, and the jury accordingly had substantial evidence to conclude that the statement "Am considering taking Tesla private at $420" and ***not*** the misrepresentations caused the price of Tesla securities to move. Second, Plaintiff's expert conceded that had Mr. Musk only tweeted the undisputedly true statement, one could expect the "same exact movement" in the price of Tesla's securities. (Tr. 1617:21-1618:1 (Heston).) Since the price movement would have been the same absent the misrepresentations, this admission alone provides substantial evidence that the "misrepresentations did not affect the market price of Tesla's stock." *See* ECF No. 655 at 13-14. Finally, Tesla's stock price ***increased*** after Mr. Musk revealed that the PIF "strongly expressed [its] support for funding a going private transaction for Tesla at this time," was "eager to proceed," and that a final proposal still needed Special Committee and regulatory approvals before any plan was put to a shareholder vote. (Ex. 53; Tr. 1688:2-9 (Hartzmark).) That Tesla's stock price rose after the correction of the Tweets and disclosure of this information—instead of plummeting as would be the case after a revelation of fraud—provides substantial evidence that the misrepresentations did not affect the market price and therefore rebuts the presumption. *Halliburton II*, 573 U.S. at 278-29. Indeed, the Court previously found on Summary Judgment that the stock price increase on August 13 supports an

inference that the misrepresentations did not affect the price of Tesla's stock, ECF No. 387 at 32, and should therefore hold again that this provides substantial evidence to support the jury's conclusion that Defendants met their burden of persuasion to rebut the fraud-on-the-market presumption. *See Reed*, 863 F.3d at 1204.

Finally, there is substantial evidence to support the jury's verdict on individual reliance. Defendants were entitled to rebut the presumption of Mr. Littleton's reliance by proving that "he did not actually rely on the integrity of the market price when he purchased Tesla securities." ECF No. 655 at 13. There is substantial evidence for the jury to reach that verdict as Mr. Littleton's testimony and documents establish that he understood that the market did not accurately reflect the value of Tesla's securities due to the stock's high volatility and attention from short sellers. (*See e.g.*, Ex. 430-2).

3. Plaintiff Failed To Meet His Burden To Prove Loss Causation

As discussed at pages 8-10, *supra*, Plaintiff did not move for judgment as a matter of law on the element of loss causation or offer any argument that the jury's verdict is not supported by substantial evidence with regard to that element. By failing to move, Plaintiff has waived that argument and cannot be entitled to judgment as a matter of law on his 10b-5 claim. *See Sagicor*, 2022 WL 17328237, at *5. For the sake of completeness and to preserve the record, however, Defendants note that there is in any event substantial evidence demonstrating that Plaintiff did not meet his burden to prove loss causation.

To prove loss causation, Plaintiff had the burden to prove that "the misrepresentations played a substantial part in causing the injury or loss that Plaintiff suffered. Plaintiff must reasonably distinguish any security-price reaction to the misrepresentations at issue from the market's reaction to other factors, such as other information or events that could affect the prices of Tesla's securities." ECF No. 655 at 15. Plaintiff was required to disaggregate or "separate any stock-price reaction to a disclosure of the allegedly concealed information from the market's reaction to other information affecting Tesla's securities prices." ECF No. 494 at 12 ("Because there are a 'tangle of factors' that may affect stock price, 'evidence that certain misrepresented risks are responsible for a loss must reasonably distinguish the impact of those risks from other economic factors.'" (citing *Nuveen Mun. High Income Opportunity Fund v. City of Alameda, Cal.*, 730 F.3d 1111, 1119 (9th Cir. 2013).).

Here, Plaintiff failed to isolate the impact of the allegedly false statements from the true statement that Mr. Musk was considering taking Tesla private at $420. *See In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1273-74 (S.D. Cal. 2010) (failure "to separate the loss caused by the disclosure of corrective information (new, negative, company-specific, revealing a prior misrepresentation or omission) from loss caused by the disclosure of other company-specific information" mandated exclusion of loss causation expert); *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 421 (7th Cir. 2015) ("[I]n order to prove loss causation, plaintiffs in securities-fraud cases need to isolate the extent to which a decline in stock price is due to fraud-related corrective disclosures and not other factors."). Plaintiff's expert, Dr. Hartzmark, admitted he did nothing to isolate how much of the purported inflation he calculated on August 7, 2018 was due to Mr. Musk's undeniably true statement that he was "considering taking Tesla private at $420" from the allegedly false statement "funding secured." (Tr. 1732:21-1733:2; 1735:4-9 (Hartzmark).). Accordingly, there was substantial evidence for the jury to conclude that Plaintiff failed to meet his burden on loss causation. *See In re Sci. Atlanta, Inc. Sec. Litig.*, 754 F. Supp. 2d 1339, 1379 (N.D. Ga. 2010) (expert's "failure to disentangle the effect of the new [fraudulent] information" from the confounding "negative characterization" of truthful non-fraudulent news did not enable jury to "determine how much, if any, of Plaintiffs' loss is attributable to Defendants'" misrepresentations), *aff'd*, 489 F. App'x 339 (11th Cir. 2012). Plaintiff's motion should be denied on this basis alone.

C. Plaintiff Did Not Move For And Should Not Be Granted Judgment As A Matter Of Law Against Tesla Or The Director Defendants

Plaintiff's motion for judgment as a matter of law and a new trial should be denied as to his Rule 10b-5 claim against Tesla and his Section 20 claim against Director Defendants Buss, Denholm, Ehrenpreis, Gracias, Murdoch, Kimbal Musk, and Johnson Rice for the additional reason that he failed to move on these specific claims against them.

In order to establish his Rule 10b-5 claim against Tesla, Plaintiff was required to prove that Mr. Musk was "acting within the scope of his authority while tweeting the statements at issue on August 7." ECF No. 655 at 10; *see also In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 475 (9th Cir. 2015). Plaintiff did not move on imputation of scienter and offered no argument that the jury lacked substantial evidence to conclude that Mr. Musk was not acting within the scope of his authority when he issued his

Tweets. To the contrary, there is ample evidence that Mr. Musk was acting as a bidder, independent of his role as Tesla CEO. (Tr. 860:16-21 (Musk); 1225:14-24 (Gracias); 1479:20-1480:8 (Denholm).). Judgment cannot be entered against Tesla for that reason alone.

Plaintiff also asserted Section 20 claims against the Director Defendants. Under Section 20, Plaintiff was required to prove that the Directors were "controlling persons" who possessed the "power to direct the management or policies" of Tesla. ECF No. 655; *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1067 n. 13 (9th Cir. 2000). Plaintiff did not move on his Section 20 claims and has not presented any argument that the Directors were controlling persons who were "active in the day-to-day affairs" of the company and "exercised any specific control over the preparation and release" of the statements giving rise to the predicate Rule 10b-5 claim. *Howard*, 228 F.3d at 1067. Nor did Plaintiff move on or argue that the jury lacked sufficient evidence to find that the Directors met their burden to prove their affirmative defense of good faith. *Id*. Judgment as a matter of law cannot be entered against the Director Defendants either.

III. THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR A NEW TRIAL

A. Plaintiff Did Not Move For And Therefore Cannot Be Granted A New Trial On Liability

Plaintiff's motion for a new trial is narrow. Instead of requesting a new trial on liability as an alternative to his Rule 50(b) motion, Plaintiff only seeks a new trial on damages should the Court grant his incomplete motion for judgment as a matter of law. Mot. at ii-iii, 20 ("A new trial should be ordered for the purpose of having a jury decide the damages caused by Musk's tweets."). Plaintiff has therefore waived any request for a new trial on liability. Should the Court deny Plaintiff's motion for judgment as a matter of law—and it must—it should also deny the motion for a new trial on damages as moot.

B. Plaintiff Cannot Be Granted A New Trial On Liability Because He Did Not Challenge The Jury's Verdict Or The Court's Instruction On Loss Causation

As to loss causation, Plaintiff does not challenge the jury's verdict for sufficiency of the evidence and does not assert any instructional error as to that element. Thus, his New Trial Motion should be denied.

"Rule 59 does not specify the grounds on which a motion for a new trial may be granted, but allows new trials to be granted for historically recognized grounds." *Shimko v. Guenther*, 505 F.3d 987, 993 (9th Cir. 2007) (quotations omitted). "The trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Id.* But "a district court may not grant or deny a new trial merely because it would have arrived at a different verdict." *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999). "Where the jury's verdict is not against the clear weight of the evidence, a district court abuses its discretion in ordering a new trial." *Id.* at 1143.

Crucially, a party's "failure to comply with Rule 50(b) forecloses its challenge to the sufficiency of the evidence" in its request for a new trial. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006). Here, Plaintiff failed to move for judgment as a matter of law on the element of loss causation and is thus barred from seeking a new trial on the grounds that the jury's verdict is contrary to the weight of the evidence. *See id.*

Plaintiff does not and cannot establish that the jury's verdict is against the weight of the evidence in any event. The only argument Plaintiff offers as to loss causation is his conclusion that "the evidence at trial firmly supports that Musk's tweets were material and, in turn, the element[] of…loss causation should be decided in Plaintiff's favor." Mot. at 20. This is plainly insufficient. First, as a matter of law, loss causation and materiality are two separate elements with separate requirements. *Compare* ECF No. 655 at 10 *with id.* at 15. Second, Plaintiff's expert did not disaggregate the price impact of Mr. Musk's true statement that he was considering taking Tesla private from the technically false statements and therefore failed to "reasonably distinguish any security-price reaction to the misrepresentations at issue from the market's reaction to other factors." ECF No. 655 at 15; *Glickenhaus*, 787 F.3d at 421; *In re Sci. Atlanta, Inc. Sec. Litig.*, 754 F. Supp. 2d at 1379. The evidence presented at trial shows that Plaintiff failed to meet his burden—he does not argue otherwise—and therefore supports the jury's verdict that Defendants are not liable for a Rule 10b-5 violation. And because Plaintiff also fails to allege that the Court's Loss Causation instruction was legally erroneous or prejudicial, he has no grounds for entitlement to a new trial on that element. The jury's verdict should therefore remain undisturbed.

Finally, even if the Plaintiff's failure to challenge any aspect of the element of loss causation was not dispositive—and it is—Plaintiff cannot establish that the jury's verdict on liability was "against the clear weight of the evidence" because Plaintiff also had to prove materiality and reliance. *See 4.0 Acres of Land*, 175 F.3d at 1139. As discussed above, ample evidence at trial supported rejecting Plaintiff's claim because Mr. Musk's statements were not materially false: Mr. Musk had a handshake deal and verbal commitment from the PIF to fund a take-private transaction, Mr. Musk had ample funding available—from third parties and his own personal wealth—to finance the transaction, and the market reaction to the August 13 Blog Post (as well as testimony of analysts, investors, and Plaintiff) establish that the difference between the true state of affairs and the Tweets was not significant to a reasonable investor's decision to buy or sell Tesla securities. Moreover, Plaintiff's own expert destroyed Plaintiff's ability to prove materiality and reliance when he admitted that the market would have the same reaction had Mr. Musk only tweeted the undisputedly true statement that he was considering taking Tesla private. The clear weight of the evidence supported the jury's determination that Defendants were not liable; granting a new trial would be an abuse of discretion in this case.

C. The Court Should Deny Plaintiff's Motion For A New Trial On Damages

Plaintiff's Motion for a New Trial on damages is defective from top to bottom and should be summarily rejected by the Court. Plaintiff's Motion presumes and is contingent on the Court granting his underlying Motion for Judgment as a Matter of Law on liability. But for the reasons discussed above, the Court cannot grant Plaintiff judgment on liability for his Rule 10b-5 claim because he waived any argument that he is entitled to judgment as a matter of law on the elements of loss causation and interstate commerce. The Motion must therefore be denied for that reason alone.

Plaintiff also claims he is entitled to a new trial due to instructional error. This claim is similarly meritless. Where, as here, the party seeking a new trial "alleges an error in the formulation of the jury instructions, the instructions are considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or inadequate." *Est. of Brown v. Lambert*, 478 F. Supp. 3d 1006, 1027-28 (S.D. Cal. 2020). "[E]ven an erroneous instruction is harmless if it is more probable than not that the jury would have reached the same verdict had it been properly instructed. In making that determination, courts look beyond the instructions to the proceedings as a whole." *Madrigal v. Allstate Ins. Co.*, 215 F.

Supp. 3d 870, 910 (C.D. Cal. 2016), *aff'd sub nom. Madrigal v. Allstate Indem. Co.*, 697 F. App'x 905 (9th Cir. 2017). If the Court's instructions "adequately allowed" a party "to argue its theory of the case to the jury without unduly prejudicing either party," a new trial is not required. *Id.* at 911.

1. The Court's Formulation Of Instruction No. 6 Was Not Erroneous

Plaintiff first contends that the Court abused its discretion and committed error by not giving Plaintiff's proposed Summary Judgment Instruction and argues that the "instruction was confusing and ultimately led to an erroneous verdict." Mot. at 21. Plaintiff is incorrect.

The Court's formulation of the summary judgment instruction was not erroneous or an abuse of discretion. The instruction adequately informed the jury of its charge—and what issues it had to assume were resolved—while protecting Defendants from the "serious danger" of unfair prejudice inherent in judicial findings of fact. *See United States v. Sine*, 493 F.3d 1021, 1033-34 (9th Cir. 2007) ("jurors are likely to defer to findings and determinations relevant to credibility made by an authoritative, professional factfinder rather than determine those issues for themselves"). The Court has discretion in formulating jury instructions and is permitted to use the "you are to assume" construction. *See e.g., Sherwin-Williams Co. v. PPG Indus., Inc.*, 2021 WL 5648019, at *3 (W.D. Pa. Dec. 1, 2021) (adopting "you can assume" language in jury instruction to describe issue previously decided by the court and holding that the alternative phrase "it has been determined" was unnecessary and may confuse the jury). The Court clearly instructed the jury "was to assume that the statements were false and made recklessly," and the jury was presumed to follow that instruction. *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009); *United States v. Reyes*, 660 F.3d 454, 468 (9th Cir. 2011).

Plaintiff's argument that the instruction created confusion amounts to nothing more than complaints about the evidence in the case and untimely objections to Defendants' arguments. Plaintiff asserts that the instruction was prejudicial and confusing because Defendants elicited testimony regarding Mr. Musk's meeting with the PIF and his ability to raise money. But this testimony was relevant to the question of whether Mr. Musk's statements were "materially false" which, as the Jury Instructions made clear, required an inquiry into whether the statements "give[] a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists." ECF No. 655 at 10. Such an inquiry necessarily called for evidence of what the true state of affairs is and what weight and

interpretation the reasonable investor would give to the statements. Plaintiff also complains that Defendants offered evidence regarding the states of mind of Mr. Musk and the Director Defendants, but that information was probative to the Director Defendants' good faith defense and the issue of apportionment. *Id.* at 19-20. Plaintiff chose to bring a Section 20 claim against the Director Defendants—which put their and Mr. Musk's states of mind at issue—and must live with that strategic decision.

Plaintiff also lists a number of statements from Defendants' closing argument that he contends were "improper, prejudicial, and factually incorrect." Mot. at 22-23. But if these statements were improper, Plaintiff had the obligation to make an objection at trial. *See Evoy v. CRST Van Expedited, Inc.*, 430 F. Supp. 2d 775, 783 (N.D. Ill. 2006) (new trial based on attorney argument not warranted where "CRST did not object to Evoy's argument" at trial and a marginally related objection "was insufficient to preserve the point that CRST now argues"). Having waived any such objections, he cannot backdoor a request for new trial based on purportedly improper attorney argument through a complaint about the Court's instruction.

A review of the entire record shows that the Court's summary judgment instruction "adequately allowed" Plaintiff "to argue [his] theory of the case to the jury without unduly prejudicing" Defendants. *See Madrigal*, 697 F. App'x at 911. In both his opening and his closing, Plaintiff repeatedly informed the jury that "there [was] no dispute that Elon Musk lied" and that the jury "must assume" that the Tweets were false and made recklessly. (Tr. 295:19-23; 295:24-25; 313:5-4; 1994:5-10). And perhaps most importantly, Plaintiff cannot credibly contend that he was prejudiced by the instruction or that the jury was unaware that the Court made its findings of falsity and recklessness when Plaintiff's own expert testified "***that Judge Chen has ruled on certain portions of these being false and not false***." (Tr. 1727:22-1728:2 (Hartzmark).) The jury knew that the Court found the statements to be false, and still returned a defense verdict. Any supposed error was thus harmless. *See Madrigal*, 697 F. App'x at 911.

2. Plaintiff Waived Any Objection To Instruction No. 9

Plaintiff asserts the Court erred by instructing the jury that it "still needed to decide whether [Mr. Musk] acted knowingly." Mot. at 24. But Plaintiff never objected to this instruction, *see* ECF No. 549 at 8, and in fact included "knowing" as an element of scienter in his own proposed instructions, ECF No. 477 at 69. He therefore waived his ability to challenge it now. *See United States v. Kaplan*, 836 F.3d

1199, 1216-17 (9th Cir. 2016) ("Waiver of a jury instruction occurs when a party considers 'the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction.'"). And since Plaintiff's counsel told the jury, moments into his opening, that "Elon Musk lied," Plaintiff cannot now claim that he was prejudiced by an instruction informing the jury that it must consider whether Mr. Musk acted with "knowing" scienter. (Tr. 295:19-23.)[3]

3. The Court Did Not Err By Declining To Give Plaintiff's Proposed Missing Witness Instruction.

Finally, Plaintiff argues that the Court erred by failing to give his proffered "Missing Witness" Instruction. The failure to give this instruction—which was transparently offered to bolster the probative effect of the dubious so-called PIF Minutes (Ex. 80)—was not an error. Plaintiff was permitted to introduce hearsay evidence, in the form of the PIF Minutes and Mr. Al-Rumayyan's text messages, without affording the Defendants the opportunity to cross-examine their authors. Defendants were well within their rights to challenge the veracity of those documents and Plaintiff was not prejudiced by the Court's decision to not read a plainly improper bolstering instruction. Plaintiff's argument that the failure to give the instruction "unfairly influenced the jury's deliberations" is meritless. The Court struck and instructed the jury to ignore Mr. Musk's comments about the absence of the PIF, (Tr. 837:3-6), and Plaintiff failed to object and therefore waived any grounds for a new trial based on Defense counsel's arguments regarding the PIF Notes or the PIF's absence. *See e.g.*, *Evoy*, 430 F. Supp. 2d at 783.

Examining the Court's 26 pages of jury instructions and the proceedings as a whole, Plaintiff cannot come close to proving that the jury would have reached a different verdict absent this alleged instructional error. *See Madrigal*, 697 F. App'x at 911. Plaintiff's New Trial Motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion for Judgment as a Matter of Law and Motion for New Trial and enter judgment in favor of all Defendants.

[3] Further, this instruction was necessary for apportionment purposes in light of Plaintiff's Rule 20 claim, and in any event any purported error was harmless given that the Court informed the jury that recklessness suffices to prove the scienter element.

DATED: March 20, 2023

Respectfully submitted,

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By: */s/ Alex Spiro*
Alex Spiro *(appearing pro hac vice)*

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ATTESTATION

I, Kyle K. Batter, am the ECF user whose ID and password are being used to file the above document. In compliance with Local Rule 5-1(h)(3), I hereby attest that Alex Spiro has concurred in the filing of the above document.

/s/ Kyle K. Batter

Kyle K. Batter